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No. 03-1097

IN THE

Supreme Court of the United States

DANA J. RITCHESON,

Petitioner,

v.

CC SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY TO BRIEF IN OPPOSITION

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RESPONSE TO BRIEF IN OPPOSITION

CC Services raises several arguments in opposition to the Petition for a Writ of Certiorari which, to the extent not addressed in the Petition, are addressed below.

I. TRANSFERS ARE ADVERSE

There Is Circuit Conflict As Well As Conflict With This Court's Dictum in *AMTRAK*

CC Services claims there is no circuit conflict, attempting to explain away the Eleventh Circuit's decision in *Maddow v. Procter & Gamble Co.*, 107 F.3d 846 (11th Cir. 1997) in which the plaintiff established unlawful discrimination when her employer told her she was being transferred to an identical job in a different city. While the Seventh Circuit

distinguished *Maddow* in its opinion in this case, the only distinction it noted was that the Eleventh Circuit concluded that Maddow's transfer created an inference that her terms and conditions of employment would be affected. There were no factual distinctions in the transfers themselves. App., 5a-6a.

In focusing on what it claims is a lack of conflict among the circuits, CC Services disregards this court's authority in *AMTRAK v. Morgan,* 536 U.S. 101, 114 (2002) in which the court grouped "transfer denials" in the set of discrete acts such as termination, failure to promote, and refusal to hire, that were "easy to identify" for the purpose of knowing when to file a Charge of Discrimination. Neither does CC Services attempt to explain why "all practices in whatever form which create inequality in employment opportunity due to discrimination " at which the anti-discrimination laws were intended to strike does not include competitively bid transfers. *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763 (1976).

Finally, in arguing that this court's decision in *Rutan* sheds no light on the meaning of the anti-discrimination provisions in Title VII and the ADEA, CC Services advocates the fiction that "adverse action" is a provision in those statutes. Those words do not appear in the statutes; rather, they comprise an element developed by the courts. *White v. Burlington Northern & Santa Fe Railway Co.,* 364 F.3d 789, 799 (6th Cir. 2004)(en banc).[1] There is nothing peculiar to cases brought under either the statutes or the First Amendment that would require "adverse action" to mean something different in each. *Stavropoulos v. Firestone,* 361 F.3d 610, 620 (11th Cir. 2004).

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[1] The element has developed from its own momentum, not unlike that which developed around another portion of Title VII where, until *Desert Palace v. Costa,* ___ U.S. ___, 123 S.Ct. 2148 (2003), many courts were reading a requirement into § 2000e-2(m) that did not exist—proof by direct evidence.

II. THE STATUTES DO NOT REQUIRE ADVERSE ACTION

As discussed above, in one of the cases cited by CC Services, *White v. Burlington Northern & Santa Fe Railway Co., supra,* 364 F.3d at 799, the Sixth Circuit acknowledged that there is no statutory basis for requiring an adverse action in either discrimination or retaliation cases under Title VII. While keeping the adverse action requirement for policy reasons (to "avoid lawsuits based on trivialities"), the Sixth Circuit abolished any distinction between the requisite level of adversity required to state a claim for discrimination, under § 2000e-2, and retaliation, under § 2000e-3, explaining, "Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase 'discriminate against' in each of its anti-discrimination provisions."*Id.,* at 799.

III. THE SIGN ON THE DOOR

CC Services concedes in note 5 of its Brief in Opposition, that posting a sign on the door saying "Women Need Not Apply, This Office Reserved For Young Men," would be unlawful. In figurative terms, that is what happened and what Ritcheson established in opposition to summary judgment. Ritcheson reached the door of the Vienna, Illinois office but CC Services barred her from entering because of her age and sex. It does not matter, under Title VII or the ADEA, how she got to that door; all that matters is that CC Services would not let her in because she was an older woman.

Since CC Services admits that barring a person from the Vienna office because of age and gender is unlawful under the ADEA and Title VII, then it follows that CC Services must recognize that those courts which have interpreted the statutes to say that such conduct falls through the cracks of statutory coverage are wrong. Since the incorrect interpretation of Title VII and the ADEA, by CC Services's

admission, is widespread among the courts, CC Services cannot contest that this court's review is necessary and appropriate.

CONCLUSION

For the reasons stated in the Petition as well as those stated above, the Petition should be granted.

Respectfully submitted,

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